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**Parent topic:** Federal Acquisition Regulation

# **11.000 Scope of part.**

This part prescribes policies and procedures for describing agency needs.

## **11.001 Definitions.**

As used in this part-

*Reconditioned* means restored to the original normal operating condition by readjustments and material replacement.

*Remanufactured* means factory rebuilt to original specifications.

## 11.002 Policy.

(a) In fulfilling requirements of 10 U.S.C.2305(a)(1), 10 U.S.C.2377, 41 U.S.C.3306(a), and 41 U.S.C.3307, agencies *shall* -

(1) Specify needs using *market research* in a manner designed to-

(i) Promote *full and open competition* (see part 6), or maximum practicable competition when using *simplified acquisition procedures*, with due regard to the nature of the *supplies* or services to be acquired; and

(ii) Only include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law.

(2) To the maximum extent practicable, ensure that *acquisition* officials-

(i) State requirements with respect to an *acquisition* of *supplies* or services in terms of-

(A) Functions to be performed;

(B) Performance required; or

(C) Essential physical characteristics;

(ii) Define requirements in terms that enable and encourage offerors to supply commercial *products* or commercial services or, to the extent that commercial *products* suitable to meet the agency's needs are not available, nondevelopmental items, in response to the agency solicitations;

(iii) Provide offerors of commercial *products*, commercial services, and nondevelopmental items an opportunity to compete in any *acquisition* to fill such requirements;

(iv) Require prime contractors and subcontractors at all tiers under the agency contracts to incorporate commercial *products*, commercial services, or nondevelopmental items as components of items supplied to the agency; and

(v) Modify requirements in appropriate cases to ensure that the requirements can be met by commercial *products* or commercial services or, to the extent that commercial *products* suitable to meet the agency's needs are not available, nondevelopmental items.

(b) The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C.205a, *et seq.*), designates the metric system of measurement as the preferred system of weights and measures for *United States* trade and commerce, and it requires that each agency use the metric system of measurement in its acquisitions, except to the extent that such use is impracticable or is likely to cause significant inefficiencies or loss of markets to *United States* firms. Requiring activities are responsible for establishing guidance implementing this policy in formulating their requirements for acquisitions.

(c) To the extent practicable and consistent with subpart 9.5, potential offerors *should* be given an opportunity to comment on agency requirements or to recommend application and tailoring of requirements documents and alternative approaches. Requiring agencies *should* apply specifications, standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development

process. Requiring agencies *should* not dictate detailed design solutions prematurely (see [7.101](#) and [7.105\(a\)\(8\)](#)).

(d)

(1) When agencies acquire *products* and services, various statutes and executive orders (identified in part [23](#)) require consideration of *sustainable acquisition* (see subpart [23.1](#)) including-

(i) Energy-efficient and water-efficient services and *products* (including *products* containing *energy-efficient standby power devices* ) (subpart [23.2](#));

(ii) *Products* and services that utilize *renewable energy* technologies (subpart [23.2](#));

(iii) *Products* containing recovered materials (subpart [23.4](#));

(iv) Biobased *products* (subpart [23.4](#));

(v) *Environmentally preferable products* and services, including EPEAT®-registered electronic *products* and non-toxic or low-toxic alternatives (subpart [23.7](#)); and

(vi) Non-ozone-depleting substances, and *products* and services that minimize or eliminate, when feasible, the use, release, or emission of *high global warming potential hydrofluorocarbons* , such as by using reclaimed instead of virgin *hydrofluorocarbons* (subpart [23.8](#)).

(2) Unless an exception applies and is documented by the requiring activity, Executive agencies *shall* , to the maximum practicable, require the use of *products* and services listed in paragraph (d)(1) of this section when-

(i) Developing, reviewing, or revising Federal and military specifications, product descriptions (including *commercial item* descriptions) and standards;

(ii) Describing Government requirements for *products* and services; and

(iii) Developing source-selection factors.

(e) Some or all of the performance levels or performance specifications in a *solicitation* may be identified as targets rather than as fixed or minimum requirements.

(f) In accordance with section 508 of the Rehabilitation Act of 1973 ([29 U.S.C. 794d](#)), the *contracting officer* shall obtain from the requiring activity the requirement documents, which *must* identify—

(1)The needs of current and future users with disabilities to determine how-

(i)Users with disabilities will perform the functions supported by the information and communication technology (ICT);

(ii)The ICT will be developed, installed, configured and maintained to support users with disabilities;

(2)The applicable ICT accessibility standards (see [subpart 39.2](#)); and

(3)Any ICT accessibility standards that cannot be met due to an exception or an exemption for

any *component* or portion of the product (see [7.105\(b\)\(5\)\(iv\)](#), [39.204](#), and [39.205](#)).

(g) Unless the agency Chief Information Officer waives the requirement, when acquiring *information technology* using Internet Protocol, the requirements documents *must* include reference to the appropriate technical capabilities defined in the USGv6 Profile (NIST Special Publication 500-267) and the corresponding declarations of conformance defined in the USGv6 Test Program. The applicability of IPv6 to agency networks, infrastructure, and applications specific to individual acquisitions will be in accordance with the agency's Enterprise Architecture (see OMB Memorandum M-05-22 dated August 2, 2005).

(h) Agencies *shall* not include in a *solicitation* a requirement that prohibits an *offeror* from permitting its employees to telecommute unless the *contracting officer* executes a written determination in accordance with FAR [7.108\(a\)](#).

## **Subpart 11.1 - Selecting and Developing Requirements Documents**

### **11.101 Order of precedence for requirements documents.**

(a) Agencies *may* select from existing requirements documents, modify or combine existing requirements documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence:

(1) Documents mandated for use by law.

(2) Performance-oriented documents (*e.g.*, a PWS or SOO). (See [2.101](#).)

(3) Detailed design-oriented documents.

(4) Standards, specifications and related publications issued by the Government outside the Defense or Federal series for the non-repetitive *acquisition* of items.

(b) In accordance with OMB Circular A-119, "Federal Participation in the Development and Use of *Voluntary Consensus Standards* and in Conformity Assessment Activities," and Section 12(d) of the National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113 ([15 U.S.C. 272](#) note), agencies *must* use *voluntary consensus standards*, when they exist, in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical. The private sector manages and administers *voluntary consensus standards*. Such standards are not mandated by law (*e.g.*, industry standards such as ISO 9000, and IEEE 1680).

### **11.102 Standardization program.**

Agencies *shall* select existing requirements documents or develop new requirements documents that meet the needs of the agency in accordance with the guidance contained in the Federal Standardization Manual, FSPM-0001; for DoD components, DoD 4120.24-M, Defense Standardization Program Policies and Procedures; and for IT standards and guidance, the Federal Information Processing Standards Publications (FIPS PUBS). The Federal Standardization Manual may be obtained from the General Services Administration (see address in [11.201\(d\)\(1\)](#)). DoD

4120.24-M *may* be obtained from DoD (see [11.201\(d\)\(2\)](#) or (3)). FIPS PUBS *may* be obtained from the Government Publishing Office (GPO), or the Department of Commerce's National Technical Information Service (NTIS) (see address in [11.201\(d\)\(4\)](#)).

### **11.103 Market acceptance.**

(a) [41 U.S.C.3307\(e\)](#) provides that, in accordance with agency procedures, the head of an agency *may*, under appropriate circumstances, require offerors to demonstrate that the items offered-

(1) Have either-

(i) Achieved commercial market acceptance; or

(ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and

(2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and *solicitation*.

(b) Appropriate circumstances *may*, for example, include situations where the agency's minimum need is for an item that has a demonstrated reliability, performance or product support record in a specified environment. Use of market acceptance is inappropriate when new or evolving items *may* meet the agency's needs.

(c) In developing criteria for demonstrating that an item has achieved commercial market acceptance, the *contracting officer shall* ensure the criteria in the *solicitation* -

(1) Reflect the minimum need of the agency and are reasonably related to the demonstration of an item's acceptability to meet the agency's minimum need;

(2) Relate to an item's performance and intended use, not an *offeror's* capability;

(3) Are supported by *market research* ;

(4) Include consideration of items supplied satisfactorily under recent or current Government contracts, for the same or similar items; and

(5) Consider the entire relevant commercial market, including small business concerns.

(d) Commercial market acceptance *shall* not be used as a sole criterion to evaluate whether an item meets the Government's requirements.

(e) When commercial market acceptance is used, the *contracting officer shall* document the file to-

(1) Describe the circumstances justifying the use of commercial market acceptance criteria; and

(2) Support the specific criteria being used.

### **11.104 Use of brand name or equal purchase descriptions.**

(a) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions *may* be advantageous under certain circumstances.

(b) Brand name or equal purchase descriptions *must* include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an "equal" item *must* meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements.

### **11.105 Items peculiar to one manufacturer.**

Agency requirements *shall* not be written so as to require a particular brand name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless-

(a)

(1) The particular brand name, product, or feature is essential to the Government's requirements, and *market research* indicates other companies' similar *products* , or *products* lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs;

(2)

(i) The authority to *contract* without providing for *full and open competition* is supported by the required justifications and approvals (see [6.302-1](#)); or

(ii) The basis for not providing for maximum practicable competition is documented in the file (see [13.106-1\(b\)](#)) or justified (see [13.501](#)) when the *acquisition* is awarded using *simplified acquisition procedures* .

(3) The documentation or justification is posted for acquisitions over \$25,000. (See [5.102\(a\)\(6\)](#).)

(b) For multiple award schedule orders, see [8.405-6](#).

(c) For orders under indefinite-quantity contracts, see [16.505\(a\)\(4\)](#).

### **11.106 Purchase descriptions for service contracts.**

In drafting purchase descriptions for service contracts, agency requiring activities *shall* ensure that inherently governmental functions (see [subpart 7.5](#)) are not assigned to a contractor. These purchase descriptions *shall* -

(a) Reserve final determination for Government officials;

(b) Require proper identification of contractor personnel who attend meetings, answer

Government telephones, or work in situations where their actions could be construed as acts of Government officials unless, in the judgment of the agency, no harm can come from failing to identify themselves; and

(c) Require suitable marking of all documents or reports produced by contractors.

### **11.107 Solicitation provision.**

(a) Insert the provision at 52.211-6, Brand Name or Equal, when brand name or equal purchase descriptions are included in a *solicitation* .

(b) Insert the provision at 52.211-7, Alternatives to Government-Unique Standards, in solicitations that use Government-unique standards when the agency uses the transaction-based reporting method to report its use of *voluntary consensus standards* to the National Institute of Standards and Technology (see OMB Circular A-119, "Federal Participation in the Development and Use of *Voluntary Consensus Standards* and in Conformity Assessment Activities"). Use of the provision is optional for agencies that report their use of *voluntary consensus standards* to the National Institute of Standards and Technology using the categorical reporting method. Agencies that manage their specifications on a *contract -by-contract* basis use the transaction-based method of reporting. Agencies that manage their specifications centrally use the categorical method of reporting. Agency regulations regarding specification management describe which method is used.

## **Subpart 11.2 - Using and Maintaining Requirements Documents**

### **11.201 Identification and availability of specifications.**

(a) Solicitations citing requirements documents listed in the General Services Administration (GSA) Index of Federal Specifications, Standards and *Commercial Item* Descriptions, the DoD *Acquisition* Streamlining and Standardization Information System (ASSIST), or other agency index *shall* identify each document's approval date and the dates of any applicable amendments and revisions. Do not use general identification references, such as "the issue in effect on the date of the *solicitation* ." *Contracting* offices will not normally furnish these cited documents with the *solicitation* , except when-

(1) The requirements document *must* be furnished with the *solicitation* to enable prospective contractors to make a competent evaluation of the *solicitation* ;

(2) In the judgment of the *contracting officer* , it would be impracticable for prospective contractors to obtain the documents in reasonable time to respond to the *solicitation* ; or

(3) A prospective contractor requests a copy of a Government promulgated requirements document.

(b) *Contracting* offices *shall* clearly identify in the *solicitation* any pertinent documents not listed in the GSA Index of Federal Specifications, Standards and *Commercial Item* Descriptions or ASSIST. Such documents *shall* be furnished with the *solicitation* or specific instructions *shall* be furnished for obtaining or examining such documents.



(c) When documents refer to other documents, such references *shall* -

(1) Be restricted to documents, or appropriate portions of documents, that apply in the *acquisition* ;

(2) Cite the extent of their applicability;

(3) Not conflict with other documents and provisions of the *solicitation* ; and

(4) Identify all applicable first tier references.

(d)

(1) The GSA Index of Federal Specifications, Standards and *Commercial Item* Descriptions, FPMR Part 101-29, *may* be purchased from the-

General Services Administration

Federal Supply Service Specifications

Section Suite 8100

470 East L'Enfant Plaza, SW

Washington, DC 20407

Telephone (202) 619-8925.

(2) Most unclassified Defense specifications and standards *may* be downloaded from the following ASSIST website:

(i) ASSIST (<https://assist.dla.mil/online/start/>).

(ii) Quick Search (<http://quicksearch.dla.mil/>).

(3) Documents not available from ASSIST *may* be ordered from the Department of Defense Single Stock Point (DoDSSP) by-

(i) Using the ASSIST Shopping Wizard (<https://assist.dla.mil/wizard/index.cfm>);

(ii) Phoning the DoDSSP Customer Service Desk, (215) 697-2179, Mon-Fri, 0730 to 1600 EST; or

(iii) Ordering from DoDSSP, Building 4, Section D, 700 Robbins Avenue, Philadelphia, PA 19111-5094, Telephone (215) 697-2667/2179, Facsimile (215) 697-1462.

(4) The FIPS PUBS *may* be obtained from-

<http://www.itl.nist.gov/fipspubs/>, or purchased from the-

Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, Telephone (202) 512-1800, Facsimile (202) 512-2250; or

National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, Telephone (703) 605-6000, Facsimile (703) 605-6900, Email: [orders@ntis.gov](mailto:orders@ntis.gov).

(e) Agencies *may* purchase some nongovernment standards, including *voluntary consensus standards*, from the National Technical Information Service's Fedworld Information Network. Agencies *may* also obtain nongovernment standards from the standards developing organization responsible for the preparation, publication, or maintenance of the standard, or from an authorized document reseller. The National Institute of Standards and Technology can assist agencies in identifying sources for, and content of, nongovernment standards. DoD activities *may* obtain from the DoDSSP those nongovernment standards, including *voluntary consensus standards*, adopted for use by defense activities.

### **11.202 Maintenance of standardization documents.**

(a) Recommendations for changes to standardization documents listed in the GSA Index of Federal Specifications, Standards and *Commercial Item* Descriptions *should* be submitted to the-

General Services Administration Federal Supply Service Office of *Acquisition* Washington, DC 20406.

Agencies *shall* submit recommendations for changes to standardization documents listed in the DoDISS to the cognizant preparing activity.

(b) When an agency cites an existing standardization document but modifies it to meet its needs, the agency *shall* follow the guidance in Federal Standardization Manual and, for Defense components, DoD 4120.24-M, Defense Standardization Program Policies and Procedures.

### **11.203 Customer satisfaction.**

*Acquisition* organizations *shall* communicate with customers to determine how well the requirements document reflects the customer's needs and to obtain suggestions for corrective actions. Whenever practicable, the agency *may* provide affected industry an opportunity to comment on the requirements documents.

### **11.204 Solicitation provisions and contract clauses.**

(a) The *contracting officer shall* insert the provision at [52.211-1](#), Availability of Specifications Listed in the GSA Index of Federal Specifications, Standards and *Commercial Item* Descriptions, FPMR Part 101-29, in solicitations that cite specifications listed in the Index that are not furnished with the *solicitation*.

(b) The *contracting officer shall* insert the provision at [52.211-2](#), Availability of Specifications, Standards, and Data Item Descriptions Listed in the *Acquisition* Streamlining and Standardization Information System (ASSIST), in solicitations that cite specifications listed in the ASSIST that are not furnished with the *solicitation*.

(c) The *contracting officer shall* insert a provision substantially the same as the provision at [52.211-3](#), Availability of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and *Commercial Item* Descriptions, in solicitations that cite specifications that are not listed in the Index and are not furnished with the *solicitation* , but *may* be obtained from a designated source.

(d) The *contracting officer shall* insert a provision substantially the same as the provision at [52.211-4](#), Availability for Examination of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and *Commercial Item* Descriptions, in solicitations that cite specifications that are not listed in the Index and are available for examination at a specified location.

## Subpart 11.3 - Acceptable Material

### 11.301 Definitions.

As used in this subpart—

*Postconsumer material* means a material or finished product that has served its intended use and has been discarded for disposal or recovery, having completed its life as a consumer item. Postconsumer material is a part of the broader category of "*recovered material* ." For paper and paper *products* , postconsumer material means "postconsumer fiber" defined by the U.S. Environmental Protection Agency (EPA) as—

(1) Paper, paperboard, and fibrous materials from retail stores, office buildings, homes, and so forth, after they have passed through their end-usage as a consumer item, including: used corrugated boxes; old newspapers; old magazines; mixed waste paper; tabulating cards; and used cordage; or

(2) All paper, paperboard, and fibrous materials that enter and are collected from municipal solid waste; but not

(3) Fiber derived from printers' over-runs, converters' *scrap* , and over-issue publications.

*Recovered material* for paper and paper *products* , is defined by EPA in its Comprehensive *Procurement* Guideline as "recovered fiber" and means the following materials:

(4) Postconsumer fiber.

(5) Manufacturing wastes such as—

(i) Dry paper and paperboard waste generated after completion of the papermaking process (that is, those manufacturing operations up to and including the cutting and trimming of the paper machine reel into smaller rolls or rough sheets) including: envelope cuttings, bindery trimmings, and other paper and paperboard waste resulting from printing, cutting, forming, and other converting operations; bag, box, and carton manufacturing wastes; and butt rolls, mill wrappers, and rejected unused stock; and

(ii) Repulped finished paper and paperboard from obsolete inventories of paper and paperboard manufacturers, merchants, wholesalers, dealers, printers, converters, or others.

## 11.302 Policy.

(a) Agencies *must* not require *virgin material* or *supplies* composed of or manufactured using *virgin material* unless compelled by law or regulation or unless *virgin material* is vital for safety or meeting performance requirements of the *contract* .

(b)

(1) When acquiring *products* other than commercial *products* as defined in [2.101](#), agencies *must* require offerors to identify used, *reconditioned* , or *remanufactured supplies* ; or unused former Government *surplus property* proposed for use under the *contract* . These *supplies* or property *may* not be used in *contract* performance unless authorized by the *contracting officer* .

(2) When acquiring commercial *products* , the *contracting officer* *must* consider the customary practices in the industry for the product being acquired. The *contracting officer* *may* require offerors to provide information on used, *reconditioned* , or *remanufactured supplies* , or unused former Government *surplus property* proposed for use under the *contract* . The request for the information *must* be included in the *solicitation* , and to the maximum extent practicable *must* be limited to information or standards consistent with normal commercial practices.

(c)

(1) When the *contracting officer* needs additional information to determine whether *supplies* meet minimum *recovered material* or biobased standards stated in the *solicitation* , the *contracting officer* *may* require offerors to submit additional information on the recycled or biobased content or related standards. The request for the information *must* be included in the *solicitation* . When acquiring commercial *products* , limit the information to the maximum extent practicable to that available under normal commercial practices.

(2) For biobased *products* , agencies *may* not require, as a condition of purchase of such *products* , the vendor or manufacturer to provide more data than would typically be provided by other business entities offering *products* for sale to the agency, other than data confirming the biobased content of a product (see 7 CFR 3201.8).

## 11.303 Special requirements for paper.

(a) The following applies when agencies acquire paper in the *United States* (as defined in [23.001](#)):

(1) Section 2(d)(ii) of Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management, establishes a 30 percent postconsumer fiber content standards for agency paper use. Section 2(d)(ii) requires that an agency's paper *products must* meet or exceed the minimum content standard.

(2) Section 2(e)(iv) of Executive Order 13514 requires *acquisition* of uncoated printing and writing paper containing at least 30 percent postconsumer fiber.

(b) *Exceptions*. If paper under paragraphs (a)(1) or (a)(2) of this section containing at least 30 percent postconsumer fiber is not reasonably available, does not meet reasonable performance

requirements, or is only available at an unreasonable price, then the agency *must* purchase-

(1) Printing and writing paper containing no less than 20 percent postconsumer fiber; or

(2) Paper, other than printing and writing paper, with the maximum practicable percentage of postconsumer fiber that is reasonably available at a reasonable price and that meets reasonable performance requirements.

### **11.304 Contract clause.**

Insert the clause at [52.211-5](#), Material Requirements, in solicitations and contracts for *supplies* that are not commercial *products* .

## **Subpart 11.4 - Delivery or Performance Schedules**

### **11.401 General.**

(a) The time of delivery or performance is an essential *contract* element and *shall* be clearly stated in solicitations. *Contracting* officers *shall* ensure that delivery or performance schedules are realistic and meet the requirements of the *acquisition* . Schedules that are unnecessarily short or difficult to attain-

(1) Tend to restrict competition,

(2) Are inconsistent with small business policies, and

(3) *May* result in higher *contract* prices.

(b) Solicitations *shall* , except when clearly unnecessary, inform bidders or offerors of the basis on which their bids or proposals will be evaluated with respect to time of delivery or performance.

(c) If timely delivery or performance is unusually important to the Government, liquidated damages clauses *may* be used (see [subpart 11.5](#)).

### **11.402 Factors to consider in establishing schedules.**

(a) *Supplies or services*. When establishing a *contract* delivery or performance schedule, consideration *shall* be given to applicable factors such as the-

(1) Urgency of need;

(2) Industry practices;

(3) Market conditions;

(4) Transportation time;

(5) Production time;

(6) Capabilities of small business concerns;

(7) Administrative time for obtaining and evaluating offers and for awarding contracts;

(8) Time for contractors to comply with any conditions precedent to *contract* performance;  
and

(9) Time for the Government to perform its obligations under the *contract* ; *e.g.*, furnishing Government property.

(b) *Construction* . When scheduling the time for completion of a *construction contract* , the *contracting officer* shall consider applicable factors such as the-

(1) Nature and complexity of the project;

(2) *Construction* seasons involved;

(3) Required completion date;

(4) Availability of materials and equipment;

(5) Capacity of the contractor to perform; and

(6) Use of multiple completion dates. (In any given *contract* , separate completion dates *may* be established for separable items of work. When multiple completion dates are used, requests for extension of time *must* be evaluated with respect to each item, and the affected completion dates modified when appropriate.)

### **11.403 Supplies or services.**

(a) The *contracting officer* may express *contract* delivery or performance schedules in terms of-

(1) Specific calendar dates;

(2) Specific periods from the date of the *contract* ; *i.e.*, from the date of award or acceptance by the Government, or from the date shown as the effective date of the *contract* ;

(3) Specific periods from the date of receipt by the contractor of the notice of award or acceptance by the Government (including notice by receipt of *contract* document executed by the Government); or

(4) Specific time for delivery after receipt by the contractor of each individual order issued under the *contract* , as in indefinite delivery type contracts and GSA schedules.

(b) The time specified for *contract* performance *should* not be curtailed to the prejudice of the contractor because of delay by the Government in giving notice of award.

(c) If the delivery schedule is based on the date of the *contract* , the *contracting officer* shall mail or otherwise furnish to the contractor the *contract* , notice of award, acceptance of proposal, or other *contract* document not later than the date of the *contract* .

(d) If the delivery schedule is based on the date the contractor receives the notice of award, or if

the delivery schedule is expressed in terms of specific calendar dates on the assumption that the notice of award will be received by a specified date, the *contracting officer shall* send the *contract*, notice of award, acceptance of proposal, or other *contract* document by certified mail, return receipt requested, or by any other method that will provide evidence of the date of receipt.

(e) In invitations for bids, if the delivery schedule is based on the date of the *contract*, and a *bid* offers delivery based on the date the contractor receives the *contract* or notice of award, the *contracting officer shall* evaluate the *bid* by adding 5 calendar days (as representing the normal time for arrival through ordinary mail). If the *contract* or notice of award will be transmitted electronically, (1) the *solicitation shall* so state; and (2) the *contracting officer shall* evaluate delivery schedule based on the date of *contract* receipt or notice of award, by adding one working day. (The term "working day" excludes weekends and U.S. Federal holidays.) If the offered delivery date computed with mailing or transmittal time is later than the delivery date required by the invitation for bids, the *bid shall* be considered nonresponsive and rejected. If award is made, the delivery date will be the number of days offered in the *bid* after the contractor actually receives the notice of award.

## **11.404 Contract clauses.**

### **(a) Supplies or services.**

(1) The *contracting officer may* use a time of delivery clause to set forth a required delivery schedule and to allow an *offeror* to propose an alternative delivery schedule. The clauses and their alternates *may* be used in solicitations and contracts for other than *construction* and architect-engineering substantially as shown, or they *may* be changed or new clauses written.

(2) The *contracting officer may* insert in solicitations and contracts other than those for *construction* and architect-engineering, a clause substantially the same as the clause at [52.211-8](#), Time of Delivery, if the Government requires delivery by a particular time and the delivery schedule is to be based on the date of the *contract*. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the *contracting officer may* use the clause with its *Alternate I*. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the *contracting officer may* use the clause with its *Alternate II*. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the *contracting officer may* use the clause with its *Alternate III*.

(3) The *contracting officer may* insert in solicitations and contracts other than those for *construction* and architect-engineering, a clause substantially the same as the clause at [52.211-9](#), Desired and Required Time of Delivery, if the Government desires delivery by a certain time but requires delivery by a specified later time, and the delivery schedule is to be based on the date of the *contract*. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the *contracting officer may* use the clause with its *Alternate I*. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the *contracting officer may* use the clause with its *Alternate II*. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the *contracting officer may* use the clause with its *Alternate III*.

### **(b) Construction . The *contracting officer shall* insert the clause at [52.211-10](#), Commencement,**



Prosecution, and Completion of Work, in solicitations and contracts when a fixed-price *construction contract* is contemplated. The clause *may* be changed to accommodate the issuance of orders under indefinite-delivery contracts. If the completion date is expressed as a specific calendar date, computed on the basis of the contractor receiving the notice to proceed by a certain *day*, the *contracting officer may* use the clause with its *Alternate I*.

## Subpart 11.5 - Liquidated Damages

### 11.500 Scope.

(a) This subpart prescribes policies and procedures for using liquidated damages clauses in solicitations and contracts for *supplies*, services, research and development, and *construction*.

(b) This subpart does not apply to liquidated damages-

(1) For subcontracting plans (see [19.705-7](#));

(2) Related to the *Contract Work Hours and Safety Standards* statute (see [subpart 22.3](#)); or

(3) Related to paid sick leave for Federal contractors (see [subpart 22.21](#)).

### 11.501 Policy.

(a) The *contracting officer must* consider the potential impact on *pricing*, competition, and *contract* administration before using a liquidated damages clause. Use liquidated damages clauses only when-

(1) The time of delivery or timely performance is so important that the Government *may* reasonably expect to suffer damage if the delivery or performance is delinquent; and

(2) The extent or amount of such damage would be difficult or impossible to estimate accurately or prove.

(b) Liquidated damages are not punitive and are not negative performance incentives (see [16.402-2](#)). Liquidated damages are used to compensate the Government for probable damages. Therefore, the liquidated damages rate *must* be a reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance of the particular *contract*. Use a maximum amount or a maximum period for assessing liquidated damages if these limits reflect the maximum probable damage to the Government. Also, the *contracting officer may* use more than one liquidated damages rate when the *contracting officer* expects the probable damage to the Government to change over the *contract* period of performance.

(c) The *contracting officer must* take all reasonable steps to mitigate liquidated damages. If the *contract* contains a liquidated damages clause and the *contracting officer* is considering terminating the *contract* for default, the *contracting officer should* seek expeditiously to obtain performance by the contractor or terminate the *contract* and repurchase (see [subpart 49.4](#)). Prompt *contracting officer* action will prevent excessive loss to defaulting contractors and protect the interests of the Government.



(d) The *head of the agency* may reduce or waive the amount of liquidated damages assessed under a *contract* , if the Commissioner, Financial Management Service, or designee approves (see Treasury Order 145-10).

## **11.502 Procedures.**

(a) Include the applicable liquidated damages clause and liquidated damages rates in solicitations when the *contract* will contain liquidated damages provisions.

(b) *Construction* contracts with liquidated damages provisions *must* describe the rate(s) of liquidated damages assessed per *day* of delay. The rate(s) *should* include the estimated daily cost of Government *inspection* and superintendence. The rate(s) *should* also include an amount for other expected expenses associated with delayed completion such as-

- (1) Renting substitute property; or
- (2) Paying additional allowance for living quarters.

## **11.503 Contract clauses.**

(a) Use the clause at [52.211-11](#), Liquidated Damages-*Supplies* , Services, or Research and Development, in fixed-price solicitations and contracts for *supplies* , services, or research and development when the *contracting officer* determines that liquidated damages are appropriate (see [11.501\(a\)](#)).

(b) Use the clause at [52.211-12](#), Liquidated Damages-*Construction* , in solicitations and contracts for *construction* , other than cost-plus-fixed-fee, when the *contracting officer* determines that liquidated damages are appropriate (see [11.501\(a\)](#)). If the *contract* specifies more than one completion date for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.

(c) Use the clause at [52.211-13](#), Time Extensions, in solicitations and contracts for *construction* that use the clause at [52.211-12](#), Liquidated Damages-*Construction* , when that clause has been revised as provided in paragraph (b) of this section.

# **Subpart 11.6 - Priorities and Allocations**

## **11.600 Scope of subpart.**

This subpart implements the Defense Priorities and Allocations System (DPAS), a Department of Commerce regulation in support of approved *national defense* , emergency preparedness, and energy programs (see 15 CFR part 700).

## **11.601 Definitions.**

As used in this subpart-

*Approved program* means a program determined as necessary or appropriate for priorities and allocations support to promote the *national defense* by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security, under the authority of the Defense Production Act, the Stafford Act, and Executive Order 12919, or the Selective Service Act and related statutes and Executive Order 12742.

*Delegate Agency* means a Government agency authorized by delegation from the Department of Commerce to place priority ratings on contracts or orders needed to support approved programs.

*National defense* means programs for military and energy production or *construction*, military assistance to any foreign nation, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act ([42 U.S.C. 5195 et seq.](#)) and critical infrastructure protection and restoration. ([50 U.S.C. App. § 2152](#)).

*Rated order* means a *prime contract*, a subcontract, or a *purchase order* in support of an *approved program* issued in accordance with the provisions of the DPAS regulation (15 CFR part 700).

## **11.602 General.**

(a) Under Title I of the Defense Production Act of 1950 ([50 U.S.C. App.2061, etseq.](#)), the President is authorized to require preferential acceptance and performance of contracts and orders supporting certain approved *national defense* and energy programs and to allocate materials, services, and facilities in such a manner as to promote these approved programs.

(b) The President delegated the priorities and allocations authorities of the Defense Production Act in Executive Order 12919. As part of that delegation, the President designated the Secretary of Commerce to administer the DPAS. For more information, check the DPAS website at: [www.bis.doc.gov/dpas](http://www.bis.doc.gov/dpas).

## **11.603 Procedures.**

(a) There are two levels of priority for rated orders established by the DPAS, identified by the rating symbols "DO" and "DX". All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over DO rated and unrated orders (see 15 CFR 700.11). The DPAS regulation contains provisions concerning the elements of a *rated order* (see 15 CFR 700.12); acceptance and rejection of rated orders (see 15 CFR 700.13); preferential scheduling (see 15 CFR 700.14); extension of priority ratings (flowdown) (see 15 CFR 700.15); changes or cancellations of priority ratings and rated orders (see 15 CFR 700.16); use of rated orders (see 15 CFR 700.17); and limitations on placing rated orders (see 15 CFR 700.18).

(b) The Delegate Agencies have been given authority by the Department of Commerce to place rated orders in support of approved programs (see Schedule I of the DPAS). Other U.S. Government agencies, Canada, and foreign nations *may* apply for priority rating authority.

(c) Rated orders *shall* be placed in accordance with the provisions of the DPAS.

(d) Agency heads *shall* ensure compliance with the DPAS by *contracting* activities within their agencies.

(e) Agency heads *shall* provide *contracting* activities with specific guidance on the issuance of rated orders in support of approved agency programs, including the general limitations and jurisdictional limitations on placing rated orders (see 15 CFR 700.18 and Executive Order 12919).

(f) *Contracting* officers *shall* follow agency procedural instructions concerning the use of rated orders in support of approved agency programs.

(g) *Contracting* officers, contractors, or subcontractors at any tier, that experience difficulty placing rated orders, obtaining timely delivery under rated orders, locating a contractor or supplier to fill a *rated order*, ensuring that rated orders receive preferential treatment by contractors or suppliers, or require rating authority for items not automatically ratable under the DPAS, *should* promptly seek special priorities assistance in accordance with agency procedures (see 15 CFR 700.50-700.55 and 700.80).

(h) The Department of Commerce *may* take specific official actions (Ratings Authorizations, Directives, Letters of Understanding, Administrative Subpoenas, Demands for Information, and *Inspection* Authorizations) to implement or enforce the provisions of the DPAS (see 15 CFR 700.60-700.71).

(i) *Contracting* officers *shall* report promptly any violations of the DPAS in accordance with agency procedures to the Office of Strategic Industries and Economic Security, U.S. Department of Commerce, Room 3876, Washington, DC 20230, Ref: DPAS; telephone: (202) 482-3634 or fax: (202) 482-5650.

## **11.604 Solicitation provision and contract clause.**

(a) *Contracting* officers *shall* insert the provision at [52.211-14](#), Notice of Priority Rating for *National Defense*, Emergency Preparedness, and Energy Program Use, in solicitations when the *contract* to be awarded will be a *rated order*.

(b) *Contracting* officers *shall* insert the clause at [52.211-15](#), Defense Priority and Allocation Requirements, in contracts that are rated orders.

## **Subpart 11.7 - Variation in Quantity**

### **11.701 Supply contracts.**

(a) A fixed-price supply *contract* *may* authorize Government acceptance of a variation in the quantity of items called for if the variation is caused by conditions of loading, shipping, or packing, or by allowances in manufacturing processes. Any permissible variation *shall* be stated as a percentage and it *may* be an increase, a decrease, or a combination of both; however, contracts for subsistence items *may* use other applicable terms of variation in quantity.

(b) There *should* be no standard or usual variation percentage. The overrun or underrun permitted in each *contract* *should* be based upon the normal commercial practices of a particular

industry for a particular item, and the permitted percentage *should* be no larger than is necessary to afford a contractor reasonable protection. The permissible variation *shall* not exceed plus or minus 10 percent unless a different limitation is established in agency regulations. Consideration *shall* be given to the quantity to which the percentage variation applies. For example, when delivery will be made to multiple destinations and it is desired that the quantity variation apply to the item quantity for each destination, this requirement *must* be stated in the *contract* .

(c) Contractors are responsible for delivery of the specified quantity of items in a fixed-price *contract* , within allowable variations, if any. If a contractor delivers a quantity of items in excess of the *contract* requirements plus any allowable variation in quantity, particularly small dollar value overshipments, it results in unnecessary administrative costs to the Government in determining disposition of the excess quantity. Accordingly, the *contract* may include the clause at [52.211-17](#), Delivery of Excess Quantities, to provide that-

(1) Excess quantities of items totaling up to \$250 in value *may* be retained without compensating the contractor; and

(2) Excess quantities of items totaling over \$250 in value *may* , at the Government's *option* , be either returned at the contractor's expense or retained and paid for at the *contract* unit price.

## **11.702 Construction contracts.**

*Construction* contracts *may* authorize a variation in estimated quantities of unit-priced items. When the variation between the estimated quantity and the actual quantity of a unit-priced item is more than plus or minus 15 percent, an equitable adjustment in the *contract* price *shall* be made upon the demand of either the Government or the contractor. The contractor *may* request an extension of time if the quantity variation is such as to cause an increase in the time necessary for completion. The *contracting officer* *must* receive the request *in writing* within 10 days from the beginning of the period of delay. However, the *contracting officer* *may* extend this time limit before the date of final settlement of the *contract* . The *contracting officer* *shall* ascertain the facts and make any adjustment for extending the completion date that the findings justify.

## **11.703 Contract clauses.**

(a) The *contracting officer* *shall* insert the clause at [52.211-16](#), Variation in Quantity, in solicitations and contracts, if authorizing a variation in quantity in fixed-price contracts for *supplies* or for services that involve the furnishing of *supplies* .

(b) The *contracting officer* *may* insert the clause at [52.211-17](#), Delivery of Excess Quantities, in solicitations and contracts when a fixed-price supply *contract* is contemplated.

(c) The *contracting officer* *shall* insert the clause at [52.211-18](#), Variation in Estimated Quantity, in solicitations and contracts when a fixed-price *construction contract* is contemplated that authorizes a variation in the estimated quantity of unit-priced items.

## **Subpart 11.8 - Testing**

## **11.801 Preaward in-use evaluation.**

*Supplies may* be evaluated under comparable in-use conditions without a further test plan, provided offerors are so advised in the *solicitation* . The results of such tests or demonstrations *may* be used to rate the proposal, to determine technical acceptability, or otherwise to evaluate the proposal (see 15.305).